

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MICHIGAN  
SOUTHERN DIVISION

JOHNNY KENNEDY,

Plaintiff,

v.

BRUCE L. CURTIS, et.al.,

Defendants.

CIVIL ACTION NO. 08-10267

DISTRICT JUDGE ARTHUR J. TARNOW

MAGISTRATE JUDGE DONALD A. SCHEER

**REPORT AND RECOMMENDATION**

**I. RECOMMENDATION:**

Plaintiff's Motion to Dismiss without prejudice should be DENIED.

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**II. REPORT:**

**A. Procedural History**

Plaintiff originally filed this action in the United States District Court for the Eastern District of Michigan on January 17, 2008 pursuant to 42 U.S.C. § 1983, alleging that Defendants violated his civil rights, specifically rights protected under the Fourth, Eighth and Fourteenth Amendments. (Docket #1). The case was dismissed without prejudice on January 28, 2008 (Docket #4). The case was reopened on February 7, 2008 (Docket #7), dismissed without prejudice again on April 16, 2009 (Docket #8), and reopened a second time on June 19, 2009 (Docket #11). On March 2, 2010 Defendant's filed a Motion for Summary Judgment (Docket # 34).

Plaintiff filed a Motion on May 13, 2010, for Voluntary Dismissal, without prejudice, as to all the Defendants. Plaintiff stated that he wanted to dismiss the complaint without

prejudice after reviewing his complaint and “conducting further investigations.” He offered no other justification for the request. (Docket # 38). Defendants filed a response on August, 13 2010, opposing Plaintiff’s motion. They contend that dismissal without prejudice is inappropriate. Defendants claim that they have already spent considerable time and resources defending the case, and that they have filed a dispositive motion that was pending (Docket # 39).

**B. Applicable Law and Standard of Review**

Fed.R.Civ.P. 41 provides, in pertinent part, as follows:

**(a) Voluntary Dismissal.**

**(1) By the Plaintiff.**

(A) *Without a Court Order.* Subject to Rules 23(e), 23.1(c), 23.2 and 66 and any applicable federal statute, the plaintiff may dismiss an action without a court order by filing:

(i) a notice of dismissal before the opposing party serves either an answer or a motion for summary judgment; or

(ii) a stipulation of dismissal signed by all parties who have appeared.

Once the opposing party has served an answer, however, “an action may be dismissed at the plaintiff’s request only by court order, on terms that the court considers proper.” Fed. R. Civ. P. 41(a)(2). Whether dismissal without prejudice under FRCP

41(a)(2) should be granted is within the sound discretion of the Court. Grover v. Eli Lilly & Co., 33 F. 3d. 716, 718 (6<sup>th</sup> Cir. 1994).

In considering whether to allow a dismissal without prejudice under FRCP 41(a)(2), “a court should consider such factors as the defendant’s effort and expense of preparation and trial, excessive delay and lack of diligence on the part of the plaintiff in prosecuting the action, insufficient explanation for the need to take a dismissal, and whether a motion for summary judgment had been filed by defendant.” Grover, *supra* at 718. Moreover, “at the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dismissing the case without prejudice.” Id. at 719.

### **C. Analysis**

In the instant case, Plaintiff’s action has been pending for 2 years and 4 months. The case has been dismissed twice, and reopened both times upon Plaintiff’s request. He now wishes to dismiss the case again without prejudice, but offers no justification for doing so. I am persuaded that it would be plainly prejudicial to the Defendants to allow Plaintiff to dismiss his claims without prejudice. Given the pending Motion for Summary Judgment, and the fact that Plaintiff has offered no explanation or justification for the request for a voluntary dismissal without prejudice, it is recommended that Plaintiff’s Motion to Dismiss without prejudice be DENIED.

### **III. NOTICE TO PARTIES REGARDING OBJECTIONS:**

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within fourteen (14) days of service of a copy hereof as provided for in 28 U.S.C. Section 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure

to file specific objections constitutes a waiver of any further right of appeal. United States v. Walters, 638 F.2d 947 (6th Cir. 1981), Thomas v. Arn, 474 U.S. 140 (1985), Howard v. Secretary of HHS, 932 F.2d 505 (6th Cir. 1991). Filing of objections that raise some issues but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. Smith v. Detroit Federation of Teachers Local 231, 829 F.2d 1370, 1373 (6th Cir. 1987), Willis v. Secretary of HHS, 931 F.2d 390, 401 (6th Cir. 1991). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this Magistrate Judge.

Within seven (7) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall address specifically, and in the same order raised, each issue contained within the objections.

s/Donald A. Scheer  
DONALD A. SCHEER  
UNITED STATES MAGISTRATE JUDGE

DATED: May 24, 2010

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### **CERTIFICATE OF SERVICE**

I hereby certify on May 24, 2010 that I electronically filed the foregoing paper with the Clerk of the Court sending notification of such filing to all counsel registered electronically. I hereby certify that a copy of this paper was mailed to the following non-registered ECF participants on May 24, 2010: **Johnny Kennedy**.

s/Michael E. Lang  
Deputy Clerk to  
Magistrate Judge Donald A. Scheer  
(313) 234-5217